COPY

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3273 / September 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14536

In the Matter of

MONTFORD AND COMPANY, INC. d/b/a MONTFORD ASSOCIATES,

and

ERNEST V. MONTFORD, SR.,

Respondents.

Reply Brief in Support of Motion to Dismiss

Respondents' Reply Brief in Support of Motion to Dismiss

Respondents Montford and Company, Inc. d/b/a Montford Associates, and Ernest V. Montford, Sr. ("Respondents"), respectfully submit this Reply Brief in Support of the Motion to Dismiss Out-of-Time Order Instituting Proceedings.

A. Failure to Comply with the Statute Bars the Action

Division of Enforcement ("Division") contends that its compliance with the 180-day statute is excused because (1) case law holds that agencies are not bound by these kinds of statute and (2) enforcing Congress' 180-day statute would conflict with the enforcement of Congress' five year statute of limitation. Neither argument has merit.

1. Case law

Contrary to Division's argument, failure to comply with the 180-day rule will bar an enforcement action. The cases cited by Division stand only for the proposition that a

time limit on agency action does not necessarily bind the agency if Congress has not "'specifie[d] a consequence for failure to comply with the provision.'" *Brock v. Pierce County,* 476 U.S. 253, 259 (1985). In the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), however, Congress has specified exactly what must happen – Commission staff must either (a) file charges or (b) inform the Director of the intent to dismiss the charges:

> Not later than 180-days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.

15 U.S.C. § 78d-5(a). In *Brooke,* the provision was open ended; here, the provision is a closed set. The law here leaves no room for doubt. Congress gave Commission staff two choices and no more than two choices: either file suit or "provide notice to the Director of the Division of Enforcement of its intent to not file an action." *Id.*

Division's argument based on *Brock* has repeatedly been rejected by the courts. *Bustamante v. Napolitano,* 582 F.3d 403 (2009), involved section 336(b) of the Immigration and Nationality Act, 8 U.S.C. § 1447(b), which contemplated agency consideration of a nationalization application followed by judicial review. The statute provided that if the agency had not made a ruling within 120 days, the applicant was entitled to initiate an action in District Court. In *Bustamante,* the agency failed to act on Bustamante's application within the 120 day period and Bustamante filed suit. *Id* at 404. After Bustamante filed suit, the agency denied Bustamante's application. The District Court dismissed the case as moot. *Id.* Division's argument in this case is almost

identical to the holding of the District Court in the *Bustamante* case: the 120 day rule did not limit the agency's power to act on the application.

But the Second Circuit reversed, holding that the agency's failure to act upon Bustamante's application within the 120 days barred the agency from doing so thereafter. *Id.* at 407. In the opinion, the Second Circuit specifically rejected the agency's reliance on *Brock*:

> Unlike the statute considered in *Brock*, the language of Section 1447(b) demonstrates that Congress intended USCIS's failure to act on a naturalization application within 120 days of the initial interview to have a consequence -- namely, that an applicant's petition to the district court beyond the 120-day period would divest the USCIS of jurisdiction. . . . Therefore, our analysis accords with *Brock* because Section 1447(b) "requires an agency . . . to act within a particular time period and specifies a consequence for failure to comply with the provision." *Brock,* 476 U.S. at 259. (quotation marks and emphasis omitted).

Id. at 409. *See also Popnikolovski v. United States Department of Homeland Security,* 726 F. Supp. 2d 953, 960 (N. D. Ill. 2010) (following *Bustamante,* holding that "*Brock* stands for the proposition that courts must pay heed to Congressional intent on the issue of deadlines for agency action.").

In this case Congressional intent is clear: if Commission staff is going to file suit, it must do so within 180 days. Division's legal argument renders one half of the statute toothless and the other half of the statute utterly meaningless. According to Division, the Congressional direction to Commission staff to file suit within 180 days is unenforceable and Commission staff is *never* obligated to notify the Director of its intent to not file suit. The statute, however, says exactly the opposite.

2. Statute of Limitations

Division also argues that enforcement of the 180-day rule would conflict with the five-year statute of limitations, 28 U.S.C. § 2462. There are at least two reasons why this argument is without merit.

First, the 180-day rule has nothing to do with the statute of limitations. The 180-day rule runs from the date that Commission staff has issued its Wells Notice; the statute of limitations runs from the day the cause of action accrues. Commission staff could have waited four years and five months from the date the cause of action accrued to issue its Wells Notice and, so long as it complied with the statute by filing suit within 180 days, the action would comply with the statute of limitations *and* the Dodd-Frank provision. Conversely, if Staff Counsel waited four years and ten months to issue its Wells Notice, and then file suit four months later, the action would be in compliance with the 180-day rule but be barred by the statute of limitation.

Thus, enforcement of the statute to bar this action makes perfect sense and is completely consistent with the statute of limitations. Under the statute of limitation and the 180-day rule, Commission staff is given a very long time to consider the facts of the case and to make the policy and enforcement decision as to whether to issue a Wells Notice. Once Commission staff issues a Wells Notice, however, Commission staff needs to be ready to act. Congress' message is clear: if you are not ready to file suit, then do not issue a Wells Notice and, if you issue a Wells Notice, then you better get on with it. Here, Commission staff issued a Wells Notice and then delayed. This is exactly what the statute does not tolerate or allow.

The second reason the statute of limitations argument is not persuasive is that the statute only applies to claims for monetary penalties, and Division here seeks

equitable remedies (disgorgement and a cease and desist order) that are not governed by the statute of limitations. (This is conceded by Division, *see* Mem. 6, n. 3). Even if this Court were to accept Division's argument that the statute of limitation somehow trumps the 180-day rule, such a ruling would still require the dismissal of all of the claims except for the Division's claim for monetary penalties.

B. Division has Not Complied with the 180-day Statute

Division contends that it complied with the 180-day Statute by obtaining an extension and filing suit within the extended time. This argument is without merit for two independent reasons. First, there is no evidence of compliance; Division's only submission is the Declaration of Division Counsel Michael Cates, which does not even purport to be based on personal knowledge, does not contain any admissible evidence, and violates the Best Evidence Rule. Second, even if the statements in Mr. Cates's Declaration were admitted into evidence, the 180-day Statute only allows an extension if the Division makes a determination that the action is "sufficiently complex," and even Mr. Cates's plainly inadmissible declaration does not refer to any determination of complexity.

1. No Admissible Evidence of Even Partial Compliance

There is no admissible evidence that Commission staff complied with Statute by obtaining an extension. The only evidence that Division has tendered in support of its factual contention that the Division obtained an extension is the Declaration of Michael Cates, a Division lawyer in this case. In his Declaration, Mr. Cates avers that the statements made in his declaration are "based on my personal knowledge and/or my review of Division records in this investigation." In other words, some of the statements in the Declaration are based on personal knowledge, and some are not based on

personal knowledge. Yet, under the law, a prerequisite to the testimony of any witness is evidence establishing the witness's personal knowledge. Federal Rule of Evidence 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." In the substantive paragraphs of the Declaration (e.g., ¶ 3-6), Mr. Cates does not offer any evidence to support any finding that he has any idea of what he is testifying about. These paragraphs are plainly inadmissible, and without such paragraphs there is no evidence that Division obtained an extension that complied with the180-day Statute.

Second, even if Mr. Cates had supplied evidence as to how he has this knowledge (by swearing, for example, that he has spoken to others or reviewed documents), the statements would have been inadmissible because they would be double and triple hearsay. For example, in paragraph 3, Mr. Cates swears that one group of unnamed people (called "Division staff of the ARO") submitted to an unnamed person (called "Division Director") in some unidentified form of communication a request "to extend the initial 180-day deadline." Mr. Cates does not explain how he knows this, *see* Fed. R. Evid. 602, but the only way he could have any inkling of this "fact" is if someone else told him, either verbally, in which case the Declaration would be at least double-hearsay, or in writing, in which case the Declaration would be at least triple hearsay. Further, if Mr. Cates is referring to a writing (and there is no way to tell), the Declaration would violate the Best Evidence Rule contained in Rule 1004 of the Federal Rules of Evidence.

Division no doubt will contend that since this action is before an Administrative Law Judge the Court should excuse Division's failure to follow rules of evidence that have been commonplace for centuries. To the contrary: in this action, Division is seeking relief that will destroy Montford's business and deprive Montford of its

property. Mr. Cates' declaration may not be allowed into evidence without making a mockery of this administrative process and violating Montford's due process rights. Since there is no admissible evidence that the Division of Enforcement complied with the law, the action must be dismissed.

2. Even if Evidence Admitted, No Compliance

Even if Mr. Cates's Declaration were admitted into evidence, in violation of any number of rules of evidence, it would fall short of excusing the Commission staff's failure to file suit on time. The 180-day Statute allows an extension only "if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline." 15 U.S.C. § 781-5(a). There is no evidence Commission staff ever made this determination.

In its brief, Division all but concedes this fatal omission. Although it gives a detailed account of when the extension was requested, and when it was granted, Division does not ever recite the necessary statutory language that a determination had been made that the investigation was "sufficiently complex." *See Mem. of Law in Opp. in 2-3, 8-9.* In addition, Mr. Cates does not say in his Declaration anything about any finding of complexity. Since Division has the burden of showing that this Court has jurisdiction over this enforcement action, its failure to show compliance with the 180-day Statute by making a determination of complexity requires this Court to dismiss the case.

Division attempts to cover for its failure to make a determination of complexity by arguing that, *had the appropriate finding of complexity been made,* this Court would

be duty-bound to defer to the agency because it is a determination that is "committed to agency discretion by law" under cases like *Heckler v. Cheney*, 470 U.S. 838 (1985). Division's argument about agency discretion misses the mark. The 180-day Statute's language about "sufficiently complex" raises two issues. The first issue is a factual one: has there been an agency determination that the case is "sufficiently complex." The second issue is *if* there has been an agency determination, how much deference should the Court accord that determination? In this case, the inquiry ends after step one: since there was no agency determination that this action is complex, the issue of how much deference to give that agency decision is not even reached. Division addresses only the second question. But clearly if the agency has not made a determination of complexity, it makes no sense to say that this Court must defer to the agency's non-decision.

Division relies on *Heckler v. Cheney,* 470 U.S. 821 (1985), but that case stands only for the unremarkable proposition that an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review – a holding that is not remotely applicable to the case. In *Massachusetts v. EPA,* 549 U.S. 497 (2007), the Supreme Court rejected a similar argument, also based on *Heckler v. Cheney,* and held that even if an EPA decision under the statutory regime might be entitled to deference, the EPA's failure to consider the statute at all was "arbitrary and capricious."[1]

The Motion to Dismiss should be granted.

This 20th day of September, 2011.

---

[1] Division has cited no cases in which an agency is granted unlimited discretion in an agency enforcement action, as opposed to an action under the Administrative Procedure Act seeking judicial review of agency decisionmaking. Indeed, a host of due process concerns would be raised if the Commission were entitled not only to make the rules as it went along, but also to make them arbitrarily.

Bruce P. Brown
Georgia Bar No. 064460
Jason F. Esteves
Georgia Bar No. 276936

McKenna Long & Aldridge LLP
303 Peachtree Street, Suite 5300
Atlanta, GA 30308
(404) 527-4000
(404) 527-4198 (facsimile)